No. 386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TEXACO INC. AND PAN AMERICAN PETROLEUM CORPORATION, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR RESPONDENT PAN AMERICAN PETROLEUM CORPORATION

W. W. HEARD
J. P. HAMMOND
WM. H. EMERSON
P. O. Box 591
Tulsa, Oklahoma 74102

WILLIAM J. GROVE
CARROLL L. GILLIAM
600 Munsey Building
Washington, D. C. 20004

Attorneys for Respondent Pan American Petroleum Corporation

March, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

TABLE OF AUTHORITIES

Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TEXACO INC. AND PAN AMERICAN PETROLEUM CORPORATION, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT PAN AMERICAN PETROLEUM CORPORATION

OPINION BELOW

The opinion of the Court of Appeals (R. 104-121) is reported at 317 F. 2d 796.

JURISDICTION

The judgment of the Court of Appeals setting aside the Commission's orders and remanding the proceedings was entered on May 20, 1963 (R. 122). The petition for writ of certiorari was filed on August 19, 1963, and granted on November 12, 1963 (R. 123). The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).[1]

QUESTIONS PRESENTED

Whether the Natural Gas Act, the Administrative Procedure Act, and constitutional requirements of due process in rate regulation permit the Federal Power Commission

(1) to "proscribe" contract pricing clauses controlling rights to file rates, and to maintain "reasonable" rates, in advance of hearings and findings under Section 7 of the Natural Gas Act, in advance of hearings under Sections 4 and 5 of that Act, and without testing of such clauses and making findings under the substantive "just and reasonable" standards of Sections 4 and 5 of the Natural Gas Act; and

---

[1] Respondent Pan American Petroleum Corporation's position on jurisdiction is that under Section 19(b), the appropriate vehicle for judicial review of orders promulgating "rules" is a petition for review upon the record in the "rule-making" proceeding (see R. 112-114 and *Pan American Petroleum Corporation* v. *Federal Power Commission*, No. 387, This Term, petition for writ of certiorari pending). Where a court undertakes review of a "rule" in reviewing a "special" order applying the "rule," Section 19(b) then (1) limits review to determination of whether the "rule" conflicts with procedural and substantive requirements of the Act, and (2) prohibits review of "reasonableness" or other issues requiring reference to alleged factual support of the "rule," *unless* the record in the underlying rule-making proceeding is certified to the court in compliance with Section 19(b) and 72 Stat. 941 (1958), 28 U.S.C. § 2112. Respondent does not agree with Commission arguments that a court may proceed to determine "reasonableness" of a "rule" in the absence of certification to that court of the record in the "rule-making" proceeding (*cf.* § 19(b) of the Natural Gas Act; 28 U.S.C. § 2112; and *Superior Oil Co.* v. *Federal Power Commission*, 322 F. 2d 601, 619-621 (9th Cir. 1963), petition for writ of certiorari pending, No. 684, This Term).

(2) to remove the subjects of pricing and rate-changing clauses, economic justification thereof, and future rates, from the hearing and substantive requirements of Sections 4, 5, and 7 of the Natural Gas Act and procedural requirements of Sections 5 and 7 of the Administrative Procedure Act, and to "prescribe" such clauses through summary "rule-making" under Section 16 of the Natural Gas Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717-717w, and of the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-1011, are set forth in the Appendix, *infra*, pp. 59-72. Commission orders in issue, amending regulations under the Natural Gas Act by Order Nos. 232, 232-A, and 242 (18 C.F.R. (Cumm. Supp. 1963)), appear at R. 12-17, 18-21, and 22-25.

STATEMENT

By letter (R. 89), the Federal Power Commission (Commission) rejected without hearing an application for a certificate of public convenience and necessity by Respondent Pan American Petroleum Corporation (Pan American) under Section 7 of the Natural Gas Act (R. 83-88), because Pan American's gas sales contract provides that in 1983, the twentieth year of deliveries, the parties may redetermine price. The Commission thereby applied its Order No. 242 (R. 22) which requires summary rejection of applications based on contracts containing pricing clauses prohibited by the Commission's earlier Order Nos. 232 and 232-A (R. 12). The court below held that such rejection and Order No. 242 are in conflict with hearing requirements and substantive standards of Sections 4,

5, and 7 of the Act, and that Order Nos. 232 and 232-A are valid as expressions of policy but not as determinative of rights in advance of hearings. The case requires initial reference to substantive content of Order Nos. 232, 232-A, and 242.

The basic regulations—Subsequent to *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954), the Commission issued regulations to provide for gas producers' filing of applications for certificates under Section 7 (18 C.F.R. §§ 157.23-157.31), and of rate schedules under Section 4 (18 C.F.R. §§ 154.91-154.102). These regulations defined "rate schedules" as sales contracts in force or subsequently executed (18 C.F.R. § 154.93), required filing of such contracts as exhibits to applications under Section 7 (18 C.F.R. §§ 157.23-157.31), and specified manner for filing notices of changes of rates under Section 4(d) (18 C.F.R. § 154.94).[2]

At that time, the Commission did not construe the Act to mean that the right to file rate changes was limited by contract clauses, but held that rates could be established by unilateral tender under Section 4(d) and Commission acceptance.[3] However, in 1956 in

[2] Petitions for review of these regulations issued in 1954 were dismissed on grounds that they were procedural and that questions of substance would be decided through hearings under Sections 7 and 4 (see *Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461 (10th Cir. 1956); *Magnolia Petroleum Co.* v. *Federal Power Commission*, 236 F. 2d 785 (5th Cir. 1956), *cert. den.*, 352 U.S. 968 (1957)).

[3] Commission construction as to pipeline agreements is discussed in *Mobile Gas Service Corp.* v. *Federal Power Commission*, 215 F. 2d 883, 885 (3rd Cir. 1954), and as to producer contracts in *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 253 F. 2d 3 (3rd Cir. 1958).

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332, this Court held that the right to file a rate or change of rate under Section 4(d) is limited by provisions of a contract filed as a "rate schedule," and that such contracts are subject to Commission modification only after hearings and findings of "unreasonableness" under standards of the Act (350 U.S. at 341, 343, 347). Thereafter, the Act was held to mean (1) that a producer may file under Section 4(d) *only* when the specific rate is authorized by clauses of the contract on file as the "rate schedule," and (2) that where such a contract right exists, the Commission may not reject the rate change, but must accept it for filing, *subject always* to Commission powers to suspend under Section 4(e) and to disallow the rate or any part thereof upon a finding as to "reasonableness." *Cf. Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), *cert. den. sub nom., Magnolia Petroleum Co.* v. *United States*, 358 U.S. 837 (1958), and *Warren Petroleum Corp.* v. *Federal Power Commission*, 282 F. 2d 312 (10th Cir. 1960).

After *Mobile*, the Commission initiated steps to limit flexible pricing provisions in producers' contracts and rights thereunder to file rates under Section 4. In 1956, the Commission recommended legislation to provide for elimination of clauses permitting rate changes by reference to (1) prices received by a purchaser and price indices, or (2) prices paid or offered to other sellers in a field or area (36th FPC Annual Report to Congress, pp. 17-19 (1956)), and for the next four years sought similar amendments of the Act, but with-

out success.[4] Accordingly, until 1961, the *Mobile* construction was applied to mean that flexible clauses were unabrogated by the Act, and producers had the right to file rates based thereon and obtain hearings prior to Commission action modifying contracts or disallowing rates.[5]

Commission Order Nos. 232 and 232-A. The Commission's second effort to prohibit certain clauses produced the orders in issue. On April 4, 1956, the Commission issued notice of a proposed regulation relating to two types of clauses only—those requiring reference to purchasers' resale rates and pricing indices, or to other prices paid in the field (21 Fed. Reg. 2388). However, no action was taken for five years until on March 3, 1961, the Commission issued its Order No. 232 (R. 12-17). The Commission thereby amended Section 154.91 of the Regulations to provide that effective April 3, 1961, *any* provisions in contracts tendered on and after April 3, 1961, containing clauses *other than* "definite" escalations in a "specific amount" at

---

[4] 37th FPC Annual Report, pp. 17-18, 25-26 (1957); 38th FPC Annual Report, pp. 15-16 (1958); 39th FPC Annual Report, pp. 12-13, 18-19 (1959); and 40th FPC Annual Report, pp. 15-17 (1960). Here, the Commission offers definitions of clauses it terms "spiral escalation," "favored nations," and "indefinite pricing" clauses. Since the underlying principle is that of "flexible forward pricing," such clauses have been more accurately described as "flexible pricing clauses" in general (see R. 19). Where a specific clause is discussed, accuracy requires reference to the *definite* economic facts specified as determinant of price, rather than erroneous, loose terms such as "spiral" or "indefinite."

[5] See, *e.g.*, *Bel Oil Corp.* v. *Federal Power Commission*, 255 F. 2d 548, 554 (5th Cir. 1958), *cert. den.*, 358 U.S. 804 (1958); *Phillips Petroleum Co.* v. *Federal Power Commission*, 258 F. 2d 906, 908 (10th Cir. 1958); *Cities Service Gas Producing Co.* v. *Federal Power Commission*, 233 F. 2d 726, 727 (10th Cir. 1956).

"definite dates" or for reimbursement of "changes in production, severance or gathering" taxes, "shall be inoperative and of no effect at law" (R. 14). The order allowed but 17 days for "comments" and made reference to a decision issued the same day in *Re Pure Oil Company*, 25 FPC 383 (R. 13).

As pointed out by a commissioner dissenting in part, this order "outlawed" not only the two types of clauses specified in the original notice (so-called "spiral" and "favored nation" clauses), but all redetermination, renegotiation, and arbitration clauses (R. 15-16). As revealed by the same commissioner, as to the latter types, the Commission had "never had a hearing on whether such provisions are contrary to the public interest" (R. 16), and had "never published notice of any intention to adopt such a rule . . ." (R. 17).[6]

Within the 17 days permitted, "comments" were filed (R. 18), but such documents filed by proponents or opponents of a "rule" are not served upon other

---

[6] In this respect, the *Pure Oil Company* proceeding cited by the majority involved a single producer, and commenced on February 27, 1959, only to resolve disputed interpretation of a contract. The Commission on May 12, 1959, added as an "additional issue" only the question of whether this so-called "favored nation" clause was "void or voidable as contrary to the public interest." The Commission ultimately decided (1) the interpretation question adversely to Pure, and (2) the clause was "contrary to the public interest," but legal and regulatory considerations precluded a declaration that such a clause in an existing contract is void (25 FPC at 387-389). The Commission itself noted that "the record" was made "with special reference to Pure's two party provisions . . ." (25 FPC at 388).

On review, the contract interpretation was affirmed only in part upon grounds set forth by the Commission, but the issue of a "void" clause or Commission dicta on this subject were neither considered nor discussed by the court. See *Pure Oil Co.* v. *Federal Power Commission*, 299 F. 2d 370 (7th Cir. 1962).

persons (*cf.* 18 C.F.R. § 1.17). Eleven days later on March 31, 1961, the Commission amended its order (R. 18-21) but modified the regulations only (1) to provide permissible "redetermination" of prices once in any five-year period for which there is no specific, fixed escalation, and only by reference to rates for other sales "in the area of the price in question," "subject to the jurisdiction of the Commission," and "not in issue in suspension or certificate proceedings" (R. 20-21); and (2) to provide that Order No. 232 applied to contracts executed after April 3, 1961 (R. 20).

Petitions for review of these orders upon the record in the "rule-making" proceeding were dismissed upon Commission insistence that review of such "general" orders is not permitted (with one court stating that when the orders were applied to disallow a particular provision, validity of the orders then could be tested (*Sun Oil Company* v. *Federal Power Commission*, 304 F. 2d 293, 294 (5th Cir. 1962)). The courts also dismissed petitions seeking review of specific orders accepting contracts with "proscribed" clauses but stating such clauses are "of no effect at law" (*Sun Oil Company* v. *Federal Power Commission*, 304 F. 2d 290, 292-293 (5th Cir. 1962)).

Between April 3, 1961, and April 2, 1962, there thus was no review of Order Nos. 232 and 232-A. The Commission continued to accept contracts containing "proscribed" clauses, but subject to testing of validity of its orders in future hearings under Sections 7, 4, or 5.

Commission Order No. 242. On October 10, 1961, the Commission issued notice of another proposed amendment to the regulations to provide for (1) rejection without hearing of producers' "rate schedules"

if the contract contained clauses other than those "prescribed" by Order No. 232-A (Section 154.93 of the Regulations, R. 25); (2) rejection without hearing of producers' applications for certificates if the contract in support contained clauses other than those so prescribed in Order No. 232-A (Section 157.25 of the Regulations, R. 25); and (3) no "consideration" of such producer contracts in determining adequacy of a pipeline's contracted gas supply in pipeline proceedings under Section 7 (Section 157.14(a)(10) of the Regulations, R. 25). Again, "comments" were permitted, but by Order No. 242 the Commission so amended the regulations, effective April 2, 1962, and applicable to contracts executed after that date (R. 22-25).

The rejection order. On October 4, 1962, Pan American executed a contract covering sale to a pipeline of gas to be produced from the Beaver Creek Field, Wind River Basin, Wyoming (R. 87). The term extends for 20 years "and so long thereafter as gas is capable of being produced in commercial quantities" from Pan American's leases (R. 88). Pricing clauses provide (1) for a one-cent escalation in 1968, 1973, and 1978, and (2) in each five-year period commencing October 1, 1983, for a "fair market price" redetermined by the parties by reference to quality, quantity, delivery pressure, delivery point, "other relevant factors," and prices then being paid in the general area under agreements recently negotiated or renegotiated, but in no event for less than 20.5 cents per thousand cubic feet (R. 87-88).

On January 16, 1963, Pan American applied under Section 7 for a certificate for this sale (R. 83-86), but by letter, the Commission rejected the application on the ground that the pricing clauses are not "permitted" under Order Nos. 232-A and 242 (R. 89-90).

Rehearing was denied (R. 91-98, 99-100), and Pan American then filed the petition docketed as Case No. 7303 below (R. 74-82).

The decision below. Seven cases were decided (R. 104-121):

(a) In Case Nos. 6947, 6973, and 7135, review was sought of orders accepting other contracts containing "proscribed" clauses, but stating that such clauses are "of no effect in law" (R. 114-115); upon Commission motions, the court dismissed, stating that these orders do not presently "aggrieve," but this "conclusion does not mean that Order Nos. 232, 232-A, and 242 are valid" (R. 116).

(b) In Case Nos. 7002 and 7179, review of Order No. 242 was sought upon the record in the rule-making proceeding (R. 108, 112); again, the Commission moved to dismiss arguing that the Act vests no jurisdiction in the courts for direct review of "a rule of general applicability" (R. 112); the court treated this as an argument as to "aggrievement," held the "controlling point" in cases construing Section 19(b) has been that "a person is not aggrieved by a general order," and dismissed the two cases (R. 113-114).[7]

---

[7] Here, in Case No. 387, This Term (petition for writ of certiorari pending), Pan American seeks review of dismissal of its petition seeking review of Order No. 242 upon the record in the rule-making proceeding. The Commission opposes such review, but here seeks to rely upon the record in such cases. In this respect, Pan American objects to the Commission's "lodging" with the Clerk of this Court documents taken from the records of "rule-making" proceedings before the Commission which were *not* included in the record certified to the court below in the instant cases, and which are *not* part of the record before this Court in this case. See *Lawn* v. *United States*, 355 U.S. 339, 354 (1958); *McClellan* v. *Carland*, 217 U.S. 268 (1910), and Brief for the Commission, p. 7, fn. 6, and p. 29, fn. 30.

(c) In Case Nos. 7303 and 7217, Pan American and Texaco Inc., sought review of separate orders rejecting applications based on contracts containing clauses "proscribed" by Order Nos. 232, 232-A, and 242 (R. 116); on the merits, the court held that Order No. 242, requiring rejection without hearing, is "void"; Order Nos. 232 and 232-A are "declarations" of "policy" which cannot, without hearings, invalidate pricing clauses retroactively or prospectively; and the orders rejecting applications without hearings must be set aside (R. 121).

In so holding, the court first noted that combination of the Commission position that its "general" orders are not directly reviewable and summary rejection of applications deprives a court of a record for "effective" review of "the basic question of propriety" of prohibited clauses (R. 117). The court recognized that Section 16 of the Act authorizes issuance of rules not in conflict with the Act, but found that here the Commission had acted not only without hearings required by Sections 7, 4, and 5, but also without application of, or prerequisite findings under, the controlling substantive standards of "public convenience and necessity" under Section 7 and "just and reasonable" under Sections 4 and 5 (R. 117-119). The court concluded that the orders are not permissible "interstitial legislation," and are in conflict with the relationship between contracting by regulated companies and Commission review powers established by the Act, particularly as construed in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956):

> "Contracts establishing such rates and charges and providing for changes therein may be modified by the Commission only after hearing and

then only by the application of the standards of 'just and reasonable' and 'public convenience and necessity.' The summary rejection of applications based on contracts containing price-changing clauses, of which the Commission does not approve, deprives the natural-gas companies of their statutory right to a hearing, ignores the statutory standards, and precludes the possibility of any effective judicial review." (R. 120-121)

SUMMARY OF ARGUMENT

For the regulated producer, access to reasonable rates under long-term contracts is fixed initially by contract clauses. These clauses control opportunity to file and prove need for rates under Section 4 of the Natural Gas Act. Specific types of clauses discussed by the Commission, or even the 1983 "redetermination" clause involved here, may or may not be perfect in operation, but the questions now are *how* and upon what *facts* the Commission may "prohibit" and "prescribe" clauses consistent with the Act's standards. The court below correctly holds that because of the subject and specificity of the Act, summary "rule-making" cannot suffice for these decisions when combined with rejection of filings without hearing. These rules thus must be measured first by what is the substance of these Commission acts, and then by what processes *can* result in lawful orders which fix clauses controlling rates. So assessed, these rules cannot stand.

I. By "prescribing" clauses before filing and its review of controlling economic facts under the Act's standards, the Commission attempts to exercise substantive powers it does not have. Commission powers are limited to modification only *after* its review of contracts negotiated in the first instance by a regulated company. *United Gas Pipe Line Co.* v. *Mobile Gas*

Service Corp., 350 U.S. 332, 341 (1956). A major purpose of Commission review is to find facts controlling decisions as to whether an existing or "prescribed" clause affords the regulated seller required access to Section 4 for maintenance of "reasonable" rates. Commission action can only be after review of such facts as to sales, sellers, markets, and economic projections —not by advance "rule" and rejection.

Under Section 7, the Commission cannot decide whether "public convenience and necessity" permits a sale without scrutiny of contracts, "rate structure," and economic feasibility; clauses consistent with this standard cannot be devised by advance "rule." *Cf. Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959); *Wisconsin* v. *Federal Power Commission*, 292 F. 2d 753 (D.C. Cir. 1961). Further, source of Commission power finally to determine "reasonableness" of a clause or to order modification is Section 5(a), and the Section 5(a) standard also cannot be applied, consistent with substantive statutory and constitutional requirements in rate regulation, unless findings are made of existent facts as to sellers, revenues, economic requirements, and projections for the future. Advance proscription of clauses forever bars Commission review of all such facts and precludes findings prerequisite to so applying the Act's standards. Inherent failure of this advance "rule" and rejection method is exemplified by clauses now "prescribed"—the Commission thereby not only destroys rights to write contracts and obtain agency review, but also bars maintenance of "reasonable" rates which flexible clauses may permit.

The Commission claims Sections 7, 4, and 5 are sources of "power" so exercised, but has acted without

applying standards of those sections. Order Nos. 232, 232-A and 242 do not mention the standards, and contain neither findings nor references to economic facts to which these standards must be applied. The Commission thus not only improperly "outlaws" two types of clauses it considers unnecessary, but prohibits "redetermination" and other clauses as to which it has had no hearings, and imposes rigid substitutes by means precluding findings that clauses so imposed are consistent with Section 7, 4, and 5 standards.

II. Applying proper tests, the court below found Order Nos. 232 and 232-A valid as expressions of policy as to clauses only, and Order No. 242 void because it operates to bar required hearings and testing. Section 16 of the Act is not a source of power to so initiate contracts in advance, and summary processes it permits may not be used when Commission action therein precludes application of controlling standards. These rules so operate to fix allegedly "reasonable" clauses; however, nature of these subjects, underlying current economic facts required to apply standards, and procedures essential to adduce a record of such facts, require adherence to Sections 7, 4, and 5 for Commission review and modification of clauses.

Cases such as *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), do not control. Among other reasons, fixing rate clauses involves the "just and reasonable" standard of rate regulation, and it thus is patent error to state that this Act and Communications Act provisions involved in *Storer* are not "significantly different." The rules here are not reconcilable with the Gas Act and its regulatory system, and prohibit hearings required for rate regulation consistent with the Gas Act, constitutional requirements, and

Sections 5, 7, and 8 of the Administrative Procedure Act. Defects in these actions also are not shielded by assertions that merely *because* the Commission proceeds by advance "rule," orders on these subjects can be cloaked with "presumptions" and no longer require economic fact-finding, specific application of standards, or hearings consistent with requirements for due process in rate regulation.

III. The Commission's methods operate to preclude "effective" judicial review, although opportunity for such review is a step required for consistency with due process. Under Section 19(b), where judicial review is upon a rejection letter, the "rule-making" record is *not* available, and beyond this, the Commission's advance "rule" and rejection method prevents development of a record upon which a court can determine whether, in fact, a clause has been tested upon facts prerequisite to application of Section 7 and Section 5(a) standards. "Trials" in "rule-making," "case-by-case," have not been required. The Commission may evolve policy and precedent as to clauses, and freely consider clauses in its customary consolidated Section 7 proceedings, and determine "reasonableness" in its Section 4 and 5 area-rate cases in progress. See *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294 (1963). There, "spiral," "favored nations," and other clauses may be assessed, and the "redetermination" clause here and satisfactory substitutes also can be tested. What emerges than may be consistent with the Act's purposes *and* preservation of access to "reasonable" rates.

ARGUMENT

INTRODUCTION

This brief shows that the orders in question neither establish "interstitial" rules, nor supply "concreteness" consistent with procedures and substantive testing required by the Natural Gas Act, the Administrative Procedure Act, and the Fifth Amendment. However, at the outset the Commission states what it terms "background." Because of Commission actions, there is no record to provide necessary focus.[8] Nevertheless it is obvious the Commission speaks narrowly of past difficulties, without reference to necessity for flexible pricing clauses in a regulated industry. The spectrum cannot be so narrowed—this issue is more critical than resolving disputed causes for fluctuating approaches of the past ten years (see *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294 (1963)).

Contracts for twenty years or more are not producer oriented; such terms result from Commission requirements that purchasing pipelines maintain a long-term committed gas supply and from practicalities of financing pipeline construction.[9] Of necessity, producers must provide for occurrences during the long term, including future drilling, workovers, buyer's market

---

[8] See R. 112-114, and the Commission's "Brief in Opposition" on Petition for Writ of Certiorari in the companion case, No. 387, This Term (petition for writ of certiorari pending).

[9] See discussion in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 113-114 (1958); *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 155-156 (1960); and as to producers' needs in *Forest Oil Corp.* v. *Federal Power Commission*, 263 F. 2d 622, 625 (5th Cir. 1959).

fluctuations, pressure decline, tax increases, and price changes (R. 32, 35, 36, 43, 50, 53). Since economic prediction must be used, flexible pricing clauses are devised as "more sensible" than "an attempt to state rigid price figures for the whole future twenty five year operation" *Shell Oil Co.* v. *Federal Power Commission*, 292 F. 2d 149, 152 (3rd Cir. 1961), *cert. den.*, 368 U.S. 915 (1962). This requires writing protective clauses tied to future events reflecting then current economic and field conditions, *e.g.*, references to buyer's cost-fixed rates, price indices, and then current contracts (Pet. Br., p. 15, fn. 14). Under the 1963 contract here, reference thus will be made twenty years hence to economic facts such as then existing quality, pressure, etc., and then recently negotiated contracts (R. 87-88).

Regulation magnifies importance of flexible clauses; absent a contract authorization, a producer cannot file, obtain a hearing, and prove need for a given rate during the long term. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). Therefore, a combination of factors is involved—the long term imposed by regulatory and pipeline financing considerations; the producer's need for economic protection over this long period of delivery obligation; and the requirement for pricing clauses permitting filing and maintaining "just and reasonable" rates.

Doubtlessly, filings followed advent of producer regulation in 1954, and rate increases followed post-war growth and inflation, but existence of flexible pricing clauses has never been shown to be "the" cause of increase in Commission duties. Inevitably in the decade since 1954, producers had to make filings under Sec-

tion 4 and must do so in the future, but there is no support for claims that flexible clauses generate "hosts" of filings "unrelated" to "economic need." Where the Commission paused in its indecision over how to determine "reasonable" rates, producers *have* proved need by concrete evidence.[10] In the same vein, flexible clauses have not impaired the Commission's ability to apply its "in-lineness" reading of the decision in *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959) (CATCO);[11] the courts have corrected the Commission view that "interpretation" of clauses involves vast studies or anything other than "ordinary principles" of contract law;[12] and the

---

[10] See, *e.g.*, *Re Christie, Mitchell & Mitchell*, 15 FPC 758 (1956); *Re Wunderlich Development Co.*, 15 FPC 690 (1956); *Re Gilbring Oil Co.*, 20 FPC 770 (1958); *Re Pan American Petroleum Corporation, et al.*, 19 FPC 463 (1958); *Re Murphy Corp., et al.*, 25 FPC 334 (1961); *Re United Carbon Co., et al.*, 25 FPC 181 (1961); *Re Columbian Carbon Co.*, 25 FPC 365 (1961); *Re Phillips Petroleum Co.*, 24 FPC 537 (1960); *Re Sinclair Oil & Gas Co.*, 22 FPC 53 (1959).

[11] See, *e.g.*, *California Oil Co., Western Div.* v. *Federal Power Commission*, 315 F. 2d 652 (10th Cir. 1963); *Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677 (D.C. Cir. 1963).

[12] See *Warren Petroleum Corp.* v. *Federal Power Commission*, 282 F. 2d 312 (10th Cir. 1960); *Pure Oil Company* v. *Federal Power Commission*, 299 F. 2d 370 (7th Cir. 1962); *Shell Oil Co.* v. *Federal Power Commission*, 292 F. 2d 149 (3rd Cir. 1961), *cert. den.*, 368 U.S. 915 (1962); *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 268 (1960). In this respect, the "thirty-eight" cases involving difficulties of "interpretation" cited by the Commission's Brief (p. 18) were, with one exception, generated by one type of clause in substantially identical contracts with a single purchaser, El Paso Natural Gas Company. The exception is a case which involved an unusual Defense contract originated in 1943 (*Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960)).

courts further have indicated that interpretations may properly be in the courts initially, leaving only the issue of "reasonableness" of a contract rate for Commission determination.[13]

This is not to say the Commission has not had a decade of difficulties; it is to say that this history has never been shown to be traceable to existence of this or that clause, and that such is not a complete "background" to the critical question of "mechanism" of future control of producers' rates consistent with opportunity for reasonable, non-confiscatory rates under long-term contracts. The Commission considers it "in the public interest that long-term contracts be utilized" (R. 13), and recognizes "pricing flexibility" is necessary "to enable the industry adequately to cope with possible changing economic conditions over the span of long-term contracts" (R. 19). The Act provides the "mechanism" for examination of these clauses under Section 7 in consolidated hearings today often involving scores of producers;[14] and also provides Sections 4 and 5 under which "just and reasonable" rates and structures are being determined for hundreds

---

[13] See *Pan American Petroleum Corp.* v. *Kansas Nebraska Natural Gas Co.*, 297 F. 2d 561 (8th Cir. 1962), *cert. den.*, 370 U.S. 937 (1962); *Pan American Petroleum Corp.* v. *Superior Court, et al.*, 366 U.S. 656 (1961).

[14] *E.g.*, *Re Sunray DX Oil Co., et al.*, Docket Nos. G-4281, *et al.*, May 28, 1963 (28 Fed. Reg. 5625); *Re Sun Oil Co., et al.*, Docket Nos. G-8592, *et al.*, August 6, 1963 (28 Fed. Reg. 8333); *Re Pan American Petroleum Corp., et al.*, Docket Nos. G-19417, *et al.*, December 12, 1963 (28 Fed. Reg. 13908); *Re Union Texas Petroleum, et al.*, Docket Nos. G-13221, *et al.*, December 31, 1962 (28 Fed. Reg. 192).

of producers in given areas upon a single record.[15] The court below but curtailed an effort to dispose of issues of most importance under this statute without use of these "mechanisms" or development of intelligible records showing that clauses have, in fact, been tested under the Act's standards. These cases thus arise because producers seek access to the Act's processes for development of "the background" and fair appraisals of clauses, relevant economic facts, and requirements for reasonable rates.

I.

THE REJECTION ORDER AND ORDER NO. 242 ARE IN CONFLICT WITH BOTH PROCEDURAL AND SUBSTANTIVE REQUIREMENTS OF SECTIONS 7, 4, AND 5 OF THE NATURAL GAS ACT

The Commission's first and perhaps most fundamental error is attempting to alter the regulatory system by changing the specific, defined relationship between contracting by regulated companies and Commission review of contracts. The beginning point for testing validity of such action is whether the statutory system permits the Commission, in advance of filing or testing of economic facts under the Act's standards, to write the contracts controlling rights to file rates for all time, and then reject a contract that differs even slightly. Order Nos. 232 and 232-A are the writing of such a contract in advance, and Order No. 242 so closes the Commission's doors.

---

[15] *Area Rate Proceeding, et al.*, Docket Nos. AR61-1, *et al.* (24 FPC 1121 (1960)) (Permian Basin); *Area Rate Proceeding, et al.*, Docket Nos. AR61-2, *et al.* (25 FPC 942 (1961)) (Southern Louisiana); *Area Rate Proceedings, et al.*, Docket Nos. AR64-1 and AR64-2, *et al.*, November 27, 1963 (28 Fed. Reg. 12646) (Hugoton-Anadarko and Texas Gulf Coast).

A. Contract Clauses Cannot Be Written by the Commission in Advance and Can Be Modified Only After Testing Economic Facts Under the Act's Standards

1. The Commission has no substantive power to initiate clauses in advance of filing and review. In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), the relationship between Commission powers and contracts was thoroughly explored. This Court held that the Act established a system under which Commission modification may occur only after contracts are written and reviewed, not before as the Commission attempts. In sum, the Act contemplates that rates may be set by individual contracts (350 U.S. at 338); "permits the relations between the parties to be established initially by contract" (350 U.S. at 339); and grants the Commission powers to modify a contract only *after* review in hearings and findings of "unreasonableness" under Sections 4 and 5 (350 U.S. at 341).[16]

Here, the Commission reverses this process. Without reference to sales, fields, market conditions, or sellers' circumstances, the Commission prescribes terms of contracts in advance. The Commission argument, as does the Ninth Circuit opinion relied upon,[17] assumes existence of such authority, but the Tenth Circuit recognized that before a question of propriety of method of exercise of "power" is reached, the question of existence of such power must be answered. The

---

[16] Applicability of this construction to producers is reflected by *Bel Oil Corp.* v. *Federal Power Commission*, 255 F. 2d 548 (5th Cir. 1958), *cert. den.*, 358 U.S. 804 (1958), and *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958).

[17] *Superior Oil Co.* v. *Federal Power Commission*, 322 F. 2d 601 (9th Cir. 1963).

only answer consistent with the Act is that given below—"Sections 4 and 5 relate to rates and charges and give the Commission power to modify contracts—not to make contracts" (R. 117). Powers to review and act after a contract is written are not authority to "review" and "modify" in advance.

The Commission avoids this question by first pointing to "substantive" powers to act *after* hearing and review, and then saying such powers may be exercised in advance and by "rule." Yet, the Act requires a step-by-step process. The court below thus looked first to the dichotomy of powers established by the Act, and found no substantive authority vested in the Commission to prescribe clauses of a sales contract in advance of filing and testing of economic facts under the Act's standards. The Commission still fails to reconcile such actions with the *Mobile* construction (Pet. Br., pp. 31, 32-38); it refers to such powers to modify a contract *after* review, but this leaves unanswered the question of source of authority to write clauses in advance, and then foreclose agency review, as Order Nos. 232, 232-A, and 242 do. The Commission simply has "made" a contract without substantive power and has done so in a manner no section of the Act permits.

2. The Commission also ignores the relationship of its review to the function of flexible clauses under the Act. In *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division, et al.*, 358 U.S. 103, 113-114 (1958), this relationship as to pipelines was summarized:

> "Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping

> the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult, if not impossible. This concern was surely a proper one for Congress to take into account in framing its regulatory scheme for the natural gas industry, cf. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 603, . . . and we think it did so not only by preserving the 'integrity' of private contractual arrangements for the supply of natural gas, 350 U.S. at page 344 . . . (subject of course to any overriding authority of the Commission), but also providing in § 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate Commission review."

For producers, necessity for access to Section 4 of the Act is similar. See *Forest Oil Corporation* v. *Federal Power Commission*, 263 F. 2d 622, 625 (5th Cir. 1959). As does a pipeline, a producer must have a contract containing clauses to serve as the key to Section 4. As does a pipeline, the producer must negotiate an "individualized" contract for specific sales with clauses related to future economic changes. Clauses which a regulatory body may find "unreasonable" then may be written, but no regulatory body can make such a determination without examination of (1) the clause so negotiated for consistency with the statutory standard, (2) the clause the agency could impose as an alternative consistent with the same applicable standard, and (3) the contract and economic factors the agency must consider in so applying the standard to both clauses.

For these reasons, "appropriate Commission review" can only be in relation to contracts tailored by buyers and sellers, and only by Commission inquiry into relevant economic facts after the contract is so drawn and filed. Absent such review, the Commission does not know whether what it forbids is or is not consistent with sellers' requirements and the Act, or whether what it "prescribes" is consistent with the Act and also affords required access to Section 4 and "just and reasonable" rates. The controlling consideration thus is not that a so-called "spiral" or "favored nations" clause may be found unreasonable after review, but is that in advance of review of contracts and sellers' requirements, the Commission simply cannot exercise the function of review intended by Sections 7, 4, or 5.

3. Section 7 requires testing of facts under the "public convenience and necessity" standard in granting, denying, or "conditioning" an application. The Commission refers to application of this standard, factors applicable, and "conditions" it may impose after hearing (Pet. Br., pp. 33-38); but the Commission has embarked upon a course which precludes such application of the Section 7 standard.

As the "*CATCO* rule" of *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959), directs, the Commission must give careful scrutiny to producers' contracts under Section 7. If, after formal hearing, the initial rate is *found* inconsistent with the "public convenience and necessity" standard, a "condition" may be imposed to require interim reduction of that rate, *pending* filing and determination of "reasonableness" of that rate under

Section 4.[18] As to other provisions, as the Commission says, Section 7 may require scrutiny, and such a hearing under Section 7 entails reference to "finances," "adequacy" of "reserves," "feasibility," and "characteristics of the rate structure" (Pet. Br., pp. 35-36); but, as to "rate structure" this Section 7 "scrutiny" does not extend to final determination of "just and reasonable" rates or clauses, *nor* permit "conditions" designed to bar access to "just and reasonable" rates under Section 4. To the contrary, scrutiny under the *CATCO* rule has a two-fold purpose the Act requires—interim consumer protection pending "full-blown" "reasonableness" determination under Section 4, *and* preservation of access to such a Section 4 hearing and findings therein consistent with criteria written into Section 4.

A "scrutiny" requiring consideration of all of these factors cannot be by imposing clauses permanently controlling "rate structure" in advance of testing. It thus is impossible to reconcile the Commission's claims. First, facts that must be considered under Section 7 are emphasized, but next the Court is told that the

---

[18] The Commission imposes "conditions" on an *ex parte* basis in granting producers' *temporary* authorizations to make sales. The courts of appeals have held that even such a temporary "condition" must be specific and within bounds of due process, *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 270 F. 2d 404, 408-409 (10th Cir. 1959); that such a "temporary" condition may not require permanent elimination of pricing provisions, *Sohio Petroleum Co.* v. *Federal Power Commission*, 298 F. 2d 465 (10th Cir. 1961); *Pan American Petroleum Corporation* v. *Federal Power Commission*, 298 F. 2d 478 (10th Cir. 1961); and that "conditions" so imposed on a temporary basis control only until such time as, after formal hearing under Section 7, the Commission issues a permanent certificate. See *Texaco Inc.* v. *Federal Power Commission*, 290 F. 2d 149 (5th Cir. 1961).

most fundamental components of a "rate structure"—clauses limiting the right to file under Section 4—need not be so examined upon the economic facts under Section 7, but may be handed out in a pre-cast form. No case cited by the Commission suggests such a course; to the contrary, each emphasizes the delicate nature of the task, after hearings under Section 7, of achieving a lawful "balance" between conflicting interests. The Section 7 standard, relating to "present" and "future," cannot be applied when the essential elements of a contract have been previously frozen in advance of required review. The Section 7 issue as to initial rate may not be so determined in advance by a "general" rule expressing "policy," *Wisconsin* v. *Federal Power Commission*, 292 F. 2d 753 (D.C. Cir. 1961); and remaining clauses of a contract likewise cannot be so prescribed if the Commission is to perform its duties under Section 7, and if access to "reasonable" rates under Section 4 is to be preserved.

4. Determination of "reasonableness" of clauses also requires fact-finding as to contracts, circumstances of sale, and sellers' economic requirements. In *CATCO*, the Court recognized that even a Section 7 "condition" requiring interim reduction of a rate must be followed by permissible filing under Section 4 and this required testing under the "reasonableness" standard. In *Mobile*, the proper forum and criteria for Commission action permanently modifying a contract clause also were said to be such rate hearings under Sections 4 or 5 and the "just and reasonable" standards. The Commission recognizes that the ultimate source of substantive power is this language of Section 5(a):

> "Whenever the Commission, *after a hearing,* * * * shall *find* that any * * * contract affecting such rate, charge, or classification *is unjust, unreasonable,* unduly discriminatory, or preferential, the Commission shall *determine the just and reasonable* * * * *contract to be thereafter observed* and in force, and shall fix the same by order * * *." (emphasis supplied)

Whether in "area-rate" cases or other cases, application of this standard to a contract or clause requires thorough examination of economic facts and producers' requirements for access to Section 4. Under a rate system resting upon long-term contracts, one set of clauses may not be "proscribed" and another "prescribed" without review of this relevant evidence as to projected revenue requirements, markets, and so on. These are the ingredients at the heart of "reasonableness" determinations in rate regulation, but the Commission argues that it may "exercise" "substantive" powers under Section 5(a) in a manner which by its nature bars Commission review of the very data by which "reasonableness" is determined. Without seller, contract, and circumstances of sale before it, the Commission assumes that it lawfully may determine one set of clauses to be "unreasonable" and another "reasonable" and impose the latter. But "reasonableness" cannot be so determined because prerequisite chronology is testing in relation to facts upon a record containing those facts required to apply this standard (*cf. Wisconsin* v. *Federal Power Commission,* 373 U.S. 294 (1963) and Pet. Br., pp. 32-33). A "reasonable" rate cannot be fixed in advance by "rule," and the same is true of a "reasonable" clause.

Facts controlling a determination of whether the "present and future public convenience and necessity" are served by a sale of gas do not even exist until after a sale has been negotiated, and economic facts which must be adduced to determine whether a clause is not "reasonable" cannot be found until the seller and the contract are before the Commission. No matter how examined, Order Nos. 232 and 232-A thus are but an attempt to do the impossible—to write "conditions" upon certificates and to prescribe "reasonable" rate structures outside of Section 7, 4, and 5 processes. Order No. 242 then cuts off access to Sections 7, 4, or 5, after a contract is written. By their nature, such orders cannot rest upon "substantive" powers which can be exercised only after testing of specific facts against specific standards.

B. Prescription of Clauses in Advance Unlawfully Bars Access to "Just and Reasonable" Rates

The Commission bypasses the relationship between clauses and the requirement that "all" rates must be "just and reasonable" (Natural Gas Act, § 4(a); *Federal Power Commission* v. *Natural Gas Pipeline Co. of America*, 315 U.S. 575 (1942); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)). A set of rigid clauses has been "prescribed" with no determination of whether those "prescribed" permit such maintenance of "reasonable" rates, and what the Commission imposes as permanent, absolute conditions to entry into interstate commerce, actually bars such access to the Act's standards. The "substantive" rights "impinged upon" thus not only are "rights to contract" initially, but also "rights" to sell

in interstate commerce at "just and reasonable" rates over the life of a long-term contract.[19]

All clauses limit the right to file,[20] but Section 4(a) permits a continuing "just and reasonable" rate for each sale. The moment a clause is written or modified by anyone, both contract and rights under the Act are affected—a producer may improvidently contract for less than a "reasonable" rate and have no complaint of an unlawful "imposition" by the Commission, but other questions arise when the Commission acts to prohibit a clause under which a "reasonable" rate *could* be filed and proved. Not the least is whether the substitute clause imposed precludes proof and establishment of "reasonable" rates, thereby erecting an unlawful bar upon entry into interstate commerce. *Cf. Standard Airlines* v. *Civil Aeronautics Board*, 177

---

[19] The Ninth Circuit erred by treating this question as involving only a "constitutional right" to hearing in "rule-making" (322 F. 2d at 614-617). That court did not start with the basic issues of (1) whether the *selection* of subject matter for "rule-making" operates to deprive a company of an *otherwise* constitutionally guaranteed hearing, as is the case in rate regulation, and (2) whether the *substance* of the rules operates to deprive a company of rates measuring up to substantive, constitutional requirements in rate regulation which extend to producers. See *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294 (1963).

[20] See *Episcopal Theological Seminary* v. *Federal Power Commission*, 269 F. 2d 228 (D.C. Cir. 1959), *cert. den. sub nom.*, *Pan American Petroleum Corp.* v. *Federal Power Commission*, 361 U.S. 895 (1959); *Bel Oil Corp.* v. *Federal Power Commission*, 255 F. 2d 548 (5th Cir. 1958), *cert. den.*, 358 U.S. 804 (1958); *Forest Oil Corp.* v. *Federal Power Commission*, 263 F. 2d 622 (5th Cir. 1959); *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 270 F. 2d 404 (10th Cir. 1959); *Sohio Petroleum Co.* v. *Federal Power Commission*, 298 F. 2d 465 (10th Cir. 1961); *Pan American Petroleum Corp.* v. *Federal Power Commission*, 298 F. 2d 478 (10th Cir. 1961).

F. 2d 18, 20 (D.C. Cir. 1949); *Federal Communications Commission* v. *Sanders Bros.*, 309 U.S. 470 (1940).

By imposing the "conditions" of Order Nos. 232, 232-A, and 242, the Commission has so acted. Clauses imposed by the Commission permit but two ineffective choices for the long term:

(a) "Fixed" escalations which all recognize require guess-work, permit no flexibility tied to economic changes, and become progressively less reliable in proportion to projections for ten, fifteen, or twenty years from date of contracting (see, *e.g.*, *Shell Oil Co.* v. *Federal Power Commission*, 292 F. 2d 149 (3rd Cir. 1961), *cert. den.*, 368 U.S. 915 (1962); and Commission position as to its own inability to make such long-range projections in considering contract term, *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137 (1960)); and

(b) "Redetermination" in relation only to other rates not "in issue" in rate or certificate proceedings before the Commission, which is in effect a freeze upon flexibility.

In operation, the latter clause provides no "reasonableness" protection. The rate this clause permits is *not* related to *then* current economic conditions or a producer's needs, but is related solely to prior *ex parte* determinations by the Commission itself. The key words in the clause are:

> ". . . not in issue in certificate or suspension proceedings . . ."

By *ex parte* "Statements of Policy" the Commission itself decides which rates are to be so placed "in issue," and such rates so remain "in issue" until pending proceedings as to those rates are concluded. See *Wiscon-*

sin v. *Federal Power Commission*, 292 F.2d 753 (D.C. Cir. 1961). Therefore, as the Commission's "clause" operates, a producer in Wyoming (1) must first ascertain what rates are "in issue" by search of the Commission's files in Washington; (2) then cannot file for a rate, regardless of economic conditions or needs, if by *ex parte* policy, the Commission already has placed all rates above that level "in issue" in *previously* pending cases; (3) must wait months or years until such prior cases are decided before he can file at or above that rate level; and (4) even then may file only a rate that has been previously fixed in these earlier proceedings without that producer or evidence as to his contract and requirements.

This is the illusion of "redetermination" allowed by the Commission. In contrast is the meaningful access to Section 4 intended by Congress to be available if the producer is to be permitted to maintain rates consistent with statutory and constitutional requirements. Thus, only by adherence to requirements of Section 5(a)—a finding that what is "proscribed" is unreasonable *and* that what is "prescribed" *is* reasonable—can the Commission permanently fix lawful clauses; and it is *because* of these very provisions of Sections 4 and 5 for responsible, of-record, determination of facts necessary to find "reasonableness," that this regulatory system satisfies constitutional requirements (*Federal Power Commission* v. *Natural Gas Pipeline Co. of America*, 315 U.S. 575 (1942); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)).

A suggestion that a possibility of administrative "waiver" of "rules" can satisfy such requirements rests upon obscuring this critical economic, financial, and timing nature of the filing right in rate regulation. A "petition" addressed solely to discretion removes

the subject of clauses, timing, and rate filings from Section 4(d), the "reasonableness" standard, and testing both the Act and Constitution require. An effort to supplant Sections 4 and 5 with pre-cast rules, or a "petition" to nebulous "discretion," thus is both legal and practical error. Substantive requirements of this Act, and such procedures actually permitting application of the "reasonableness" standard in rate regulation, are among those cited by this Court as requiring "protection" against "erosion," even where "administrative and regulatory actions are under scrutiny." *Greene* v. *McElroy*, 360 U.S. 474, 496-497 (1959).

C. The Commission Has Acted Without Applying the Controlling Statutory Standards

Aside from the foregoing, the court below found the Commission erred by attempting to "proscribe" clauses without actual application of standards of Sections 7, 4, and 5 (R. 119). This conclusion does not rest upon mere absence of words; rather, the court referred to Order Nos. 232, 232-A, and 242, and correctly found that none of the matters mentioned relates to the Act's standards; and that without proceedings under Sections 7, 4, or 5, no facts can be adduced to sustain findings under the statutory standards essential to support the actions taken.[21]

---

[21] By contrast, the Ninth Circuit in *Superior* did not consider this question in relation to tests of whether, when an agency claims to have acted by application of statutory standards, the order reflects required findings, and the supporting record includes the facts that, as a matter of law, must be adduced before the specific statutory standard can be applied (*cf.* Section 19(b) of the Natural Gas Act). Under the Ninth Circuit's approach, an order purporting to determine a "just and reasonable" rate by "rule" could be sustained even though there are no findings and no record facts as to revenue requirements, etc., prerequisite to a "reasonableness" determination.

As to Section 7, neither order reflects an examination of the facts, ingredients, and factors always required for determining "public convenience and necessity" (*e.g.*, as the Commission says, application of this standard requires reference to "rate questions," "rate structure," "financial set-up," economic "feasibility," etc. (Pet. Br., pp. 34-37)); but by these orders, and now relying upon Section 7 substantive authority, the Commission purports to decide which clauses will or will not satisfy, for all time, "present and future public convenience and necessity."

As to Sections 4 and 5, neither order refers to or reflects an examination of facts always prerequisite to determining whether an existing clause is "reasonable" or a clause "prescribed" instead is "reasonable" (*e.g.*, the myriad economic facts, financial, trend and "area-rate" factors discussed in *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294 (1963)); but now claiming to exercise Section 4 or 5 substantive authority, the Commission has purported to condemn one clause and prescribe another.

The Commission thus *has* attempted to "substitute its standards for the statutory standards" (R. 119). The Commission now urges that "language" need not be "parrotted," and mention of "the public interest" suffices, but the Commission confuses an intended, ultimate "policy" result with the mechanics, findings, and standards the Act requires to produce orders and records showing that, in fact, such *is* the result reached.

Thus, in *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956), the Court specifically held that "condition precedent" to exercise of power to modify a contract *was* application of the statutory standard and "a finding that the existing

rate is 'unjust, unreasonable, unduly discriminatory or preferential.' ". Similarly, *Mobile* emphasizes necessity for adherence to Section 5(a) and required findings thereunder; *CATCO* emphasizes necessity for actual examination of factual data, including rates, and for issuance of producer certificates *under* the standard of "public convenience and necessity" *after* evaluation of "all factors" bearing on "the public interest" (360 U.S. at 391); and in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961), this *CATCO* language was both quoted and applied. This Court did not hold that mere recital of three words suffices for findings, facts, and conclusions required to apply the Act's standards. Obviously in both *CATCO* and *Mobile*, the Commission claimed that what it had done below was in "the public interest," but its acts were reversed, and for the reason that despite such avowals, its decisions did not reflect actual application of the controlling statutory standards.

Wisconsin v. *Federal Power Commission*, 373 U.S. 294 (1963), also does not support the Commission. Upon a comprehensive record under Sections 4 and 5, the Commission left clauses and rates standing, concluding data justified rates in issue. In view of extensive findings, factual support relevant to determining "reasonableness," and a record of "substance," termination of dockets was sustained; but nothing was said justifying orders purporting to apply Section 4 or 5 standards without a record, factual data, and findings prerequisite to an ultimate "reasonableness" determination and proscription of clauses.

Failure to consider and apply controlling standards is fatal regardless of a "form-of-proceeding" selected

by the Commission.[22] When the Commission invokes Sections 7, 4, or 5 to "proscribe" clauses, its orders and records must reflect conscious application of the substantive standards *and* consideration of the economic facts prerequisite to their application. No record supports a claim that the substantive acts taken by Order Nos. 232, 232-A, and 242 were so entered or are so supported (*cf. National Broadcasting Co.* v. *United States*, 47 F. Supp. 940, 945 (D.C.S.D.N.Y. 1942), where the court found the agency based its action upon proper "theory" and made "specific findings" as to contracts).

Nothing said below even suggests that such application of standards must be "case-by-case" for each of "hundreds" of producers. This was merely Commission exaggeration below (R. 119), as here. The Commission has been left free to consider pricing clauses in its consolidated Section 7 proceedings to review specific pipeline projects and related initiation of producers' sales in new fields;[23] to consider in its

---

[22] *Cf. United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), relied upon by the Commission. In formulating a rule, the Communications Commission was found to have considered and consciously applied the *same* substantive standard of "public interest, convenience and necessity" that also would have been prerequisite to a specific order on the same subject (351 U.S. at 195, fn. 1).

[23] See, *e.g.*, *Re Natural Gas Pipeline Co. of America, et al.*, Docket Nos. CP62-243, *et al.*, November 30, 1962 (27 Fed. Reg. 12154) (34 producers); *Re Transwestern Pipeline Co., et al.*, Docket Nos. G-20464, *et al.*, July 30, 1963 (28 Fed. Reg. 8008) (19 producers); *Re Medina Gathering Corp., et al.*, Docket Nos. CP62-194, *et al.* (Opinion No. 397, July 16, 1963) (10 producers); *Re El Paso Natural Gas Co., et al.*, Docket Nos. G-17849, *et al.* (Opinion No. 390, June 19, 1963) (19 producers); *Re Michigan Wisconsin Pipe Line Co., et al.*, 27 FPC 449 (1962) (12 producers); *Re El Paso Natural Gas Co., et al.*, 23 FPC 369 (1960) (17 producers).

similar consolidated proceedings specific clauses customarily used or required in a given state or area because of local conditions or quality differentials, as the Commission *is* doing;[24] and to consider necessity for one clause or another in its consolidated Section 7 "area" proceedings which include all applications in areas as broad as all of Mississippi, South Louisiana or Central Oklahoma.[25] "Area-pricing" also is undisturbed, and the Commission is free to consider necessary clauses in these proceedings under Sections 4 and 5, in which all affected producers, state agencies, pipelines, royalty owners, and others can be heard, present evidence, and explore fully all factors and ramifications of final determinations of "reasonableness."[26] In sum, all "problems" cited by the Commission, including its internal administrative difficulties, can be solved under the Act's processes, but not by these "unauthorized short cuts." *Mississippi River Fuel Corporation* v. *Federal Power Commission*, 202 F. 2d 899, 903 (3rd Cir. 1953).

The holding below thus correctly pinpoints Commission errors of substance in attempting to initiate rate clauses in advance of agency review.

---

[24] See *e.g. Re Sunray DX Oil Co., et al.*, Docket Nos. G-4281, *et al.*, May 28, 1963 (28 Fed. Reg. 5625) (121 producers).

[25] See *e.g. Re Sun Oil Co., et al.*, Docket Nos. G-8592, *et al.*, August 6, 1963 (28 Fed. Reg. 8333) (17 producers); *Re Pan American Petroleum Corp., et al.*, Docket Nos. G-19417, *et al.*, December 12, 1963 (28 Fed. Reg. 13908) (48 producers); *Re Union Texas Petroleum, et al.*, Docket Nos. G-13221, *et al.*, December 31, 1962 (28 Fed. Reg. 192) (168 producers).

[26] See *Area Rate Proceeding, et al.*, Docket Nos. AR61-1, *et al.* (24 FPC 1121 (1960)) (Permian Basin); *Area Rate Proceeding, et al.*, Docket Nos. AR61-2, *et al.* (25 FPC 942 (1961)) (Southern Louisiana); *Area Rate Proceedings, et al.*, Docket Nos. AR64-1 and AR64-2, *et al.*, November 27, 1963 (28 Fed. Reg. 12646 (1963)) (Hugoton-Anadarko and Texas Gulf Coast).

II.

THE COMMISSION HAS NOT EXERCISED RULE-MAKING POWER LAWFULLY

On the "form-of-proceeding" question, the Commission attack is wide of the mark. The specific holding is that Order No. 242 is an improper exercise of "rule-making" power, and that Order Nos. 232 and 232-A may stand as valid expressions of policy. All that is required is that "proscription" of clauses and "prescription" of alternatives be upon an intelligible record reflecting proper application of substantive tests the Act specifies.

A. Tests for Validity of an Agency Rule Have Been Applied Properly

No novel tests of an agency rule have been applied. While the Commission still seems to believe the principal test is merely whether an agency had a "reasonable ground" for "exercise of judgment" (Pet. Br., p. 29), the court below correctly started with whether these rules have "statutory authorization," within the "bounds" of "administrative powers" (R. 117). These are the initial tests of validity, as "overstepping of boundaries" is an act in excess of power, *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 289-290 (1954); and an order which ". . . operates to carry out a rule out of harmony with the statute, is a mere nullity," *Manhattan General Electric Co.* v. *Commissioner*, 297 U.S. 129, 134-135 (1936).[27] Finding the rules so out of "harmony," the court correctly did not reach questions

[27] See also *Helvering* v. *Sabine Transport Company*, 318 U.S. 306, 311-312 (1943); *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 616 (1944); *Miller* v. *United States*, 294 U.S. 435, 444 (1935).

of "presumptions" that extra-record facts exist, or of "reasonable" exercise of a power already held not to exist.[28]

The reasons an improper exercise of Section 16 rule-making power occurred can be succinctly stated—the regulatory system, particularly as construed in *Mobile*, vests no power in the Commission to "initiate" contracts *prior* to Commission review under the Act; exercise of substantive powers granted by Sections 7, 4, and 5 requires hearings prescribed and application of specific substantive standards to facts *prior* to final Commission action prescribing clauses; and orders which purport to exercise these substantive powers must rest upon proper factual support, required findings, and application of the Section 7, 4, and 5 standards. As to Section 16, the holding simply is that rules "to carry out" the Act cannot be "in conflict" with its substantive provisions (R. 117), and that Section 16 permits truly "interstitial" rules, but is not a source of power so to "legislate" in conflict with the Act. See *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508 (1949); *Willmut Gas & Oil Co.* v. *Federal Power Commission*, 294 F.2d 245, 250 (D.C. Cir. 1961), *cert. den.*, 368 U.S. 975 (1962). Legitimate use of Section 16 is unaffected.[29]

---

[28] Absence of jurisdiction in the Ninth Circuit to proceed to the latter questions without a record in light of provisions of Section 19(b) of the Act and of prior certification of record to the Tenth Circuit, is discussed *infra*, pp. 54-56.

[29] Applying the same correct test the Tenth Circuit thus has sustained rules issued under Section 16 which did not involve the overreaching found here. See *Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461 (10th Cir. 1956); *Amerada Petroleum Corp.* v. *Federal Power Commission*, 293 F. 2d 572 (10th Cir. 1961), *cert. den.*, 368 U.S. 976 (1962); *Pan American Petroleum Corp.* v. *Federal Power Commission*, 268 F. 2d 827 (10th Cir. 1959).

Correctness of this testing is underscored by errors in the *Superior* decision upon which the Commission now relies. The Tenth Circuit correctly started with the substance of what these orders actually do—prescribe allegedly "reasonable" clauses controlling rates and access to "reasonable" rates—and examined the standards and procedures relevant and required when the agency performs such a function. In contrast, the Ninth Circuit in *Superior* at the outset ignored substance, and first "decided" there is no "constitutional hearing" requirement in "rule-making" (322 F.2d at 609), without regard for the principle that whether there is such a requirement is not so controlled at the outset by "form of proceeding" chosen, but is by the substance of what the deciding authority is actually doing.[30] In the same way, as to whether substantive authority vested under Sections 7, 4, and 5, and relating to rate-changing clauses, *actually can* be "exercised" through Section 16, the Ninth Circuit disposed of the issue by a series of academic propositions: (1) "rule-making" requires no of-record "evidentiary" hearing, (2) the Commission has substantive powers under Sections 7, 4, and 5, (3) that "hearings" are required under those sections does not bar issuance of rules under Section 16, and (4) therefore, orders of substance can be issued under Section 16.[31] The most

---

[30] *Cf. Cafeteria & Restaurant Workers Union Local 473* v. *McElroy*, 367 U.S. 886, 895 (1961): "... [c]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest affected by governmental action."

[31] The Ninth Circuit's discussion of cases, even of those involving rate regulation, thus dealt with "procedural due process of law." The effect of the rules in barring substantively "reasonable" rates was left aside.

significant, specific questions of substance thus disappeared in a series of assumptions, including the singularly incorrect "assumption" that despite their function in rate regulation, the rules here are no different from rules issued under the Communications Act which dealt with licensing.

The critical question thus passed over was decided correctly by the Tenth Circuit—in light of the *Mobile* construction, the subject matter, the statutory requirement for "reasonable" clauses for sales and sellers, and the agency's function and facts required when it acts on that subject matter, substantively valid orders on these subjects cannot be issued by summary "rule" in advance of hearings, testing of facts, and application of Section 7, 4, and 5 standards.

B. Existence of Rule-Making Power Does Not License Removal of the Subjects of Pricing Clauses and Future Rates From Required Procedures and Substantive Testing

The Commission claims its resort to summary process is supported by decisions affirming rules issued by other agencies. These decisions are not applicable, as this Commission does not have unlimited authority to remove the subjects of clauses and future rates from the of-record processes required by Sections 7, 4, and 5 of the Natural Gas Act, Sections 5 and 7 of the Administrative Procedure Act, and constitutional guarantees applicable to decisions upon rate questions.

1. *United States* v. *Storer Broadcasting Company*, 351 U.S. 192 (1956), a key to the Ninth Circuit's error, is not controlling. Legitimate "rule-making" always depends first upon what substantive acts an agency is performing, and a "rule" must be "reconcilable" with a statute "as a whole." In *Storer*, a rule dealing with

licenses for the privilege of entry into the public domain of the air-waves was involved (see *Federal Communications Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933)); but here the subject not only is the question of clauses at issuance of a certificate for sale of private property, the commodity natural gas, but also is the fixing of allegedly "just and reasonable" clauses controlling forever the seller's access to "reasonable" rates.[32] The "broadcast" section of the statute involved in *Storer* neither prescribes control of "rates," nor establishes the structure, procedures, and standards applicable under statutes providing for rate control. See *Federal Communications Commission* v. *Sanders Brothers*, 309 U.S. 470, 474-475 (1940). Consequently, the "hearing" question in *Storer* did not extend to other "hearing" requirements having roots in constitutional requirements for both procedural and substantive due process under a standard requiring "reasonable" contracts and rates, as does the Natural Gas Act (*cf. Federal Power Commission* v. *Natural Gas Pipeline Co. of America*, 315 U.S. 575, 586 (1942); *American Bond & Mortgage Co.* v. *United States*, 52 F.2d 318 (7th Cir. 1931), *cert. den.*, 285 U.S. 538 (1932)). Thus, if *Storer* were so controlling under the Gas Act, as the Commission argues, the "hearing" requirements considered so carefully in *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294 (1963), could be eliminated, and all rates fixed without of-record hearings despite what the Act and the Constitution require. (See *Federal Power Commission* v. *Natural Gas Pipeline Co. of America*, 315 U.S. 575 (1942); *Federal Power Commission* v. *Hope Natural Gas Co.*,

[32] *E.g.*, Pan American's contract here extends for the life of the leases covered thereby (R. 88).

320 U.S. 591 (1944).) An agency order attempting to do the same as to rate-fixing clauses likewise cannot be sustained. What was said in *Storer* as to a "hearing" requirement thus does not control, because of these basic distinctions in subject matter and agency actions involved.[33]

Second, the fact that "procedures" described in *Storer* may be used does not validate a "rule" substantively. See *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284 (1954); *Functional Music, Inc.* v. *Federal Communications Commission*, 274 F.2d 543 (D.C. Cir. 1958), *cert. den. sub nom., United States* v. *Functional Music, Inc.*, 361 U.S. 813 (1959). In *Storer*, the rule was found "reconcilable with the statute" upon a record reflecting consideration of the applicable standard; the rule also was found to supply "concreteness" to a clearly expressed congressional direction to limit concentration of control of broadcast stations. Here, as found below, the rule runs directly counter to the Act's purpose, policy, and prescription of Commission powers over contracts, particularly as construed in *Mobile*. Under the applicable standards here (which were not applied), "concreteness" and "reasonable" clauses can be determined *only* when the regulated company is

[33] While the "specific" order here is rejection of a certificate application, the substance of "general" orders requiring such rejection fixes finally and permanently "permissible" contracts and clauses controlling rates, a function the Commission can exercise only under its "rate-making" powers of Sections 4 and 5, and which the Commission here claims as source of "substantive" authority exercised in issuing the "general" orders. Thus, *CATCO* illustrates the point as to "licensing" under the Gas Act—use of interim conditions in "licensing" carefully drawn not to bar a "reasonableness" determination, is required because Sections 4 and 5 and application of the "just and reasonable" test are prerequisite to final permanent Commission action upon contract provisions controlling rates.

before the Commission with the economic facts absolutely prerequisite to lawful application of the "reasonableness" standard. In contrast, a "ceiling" consistent with a policy of limiting concentration of control could be validly fixed with or without facts as to whether Storer itself is permitted five, seven, or nine licenses. However, whether a rate-fixing clause is in the "public convenience and necessity," is "reasonable," and is essential to provide "reasonable" rates over the life of a contract cannot be decided without facts as to sales and affected companies being of-record *and found*—the Gas Act's standard of "reasonableness" envisions determinations which are "just and reasonable in their application to particular persons and companies." *Bowles* v. *Willingham*, 321 U.S. 503, 516-518 (1944).

Third, the "hearing" requirement as to "licensing" in *Storer* was not absolute and mandatory even for consideration of an application, and became mandatory only in the event of possible denial (see 351 U.S. at 195, fn. 5). By contrast, the Power Commission can neither consider, grant, condition, nor deny even an application under Sections 7(c) and (e) without a formal hearing;[34] and can never find a contract "unreasonable,"

---

[34] Thus, at page 34 of the "Brief for the Federal Power Commission" in *H. L. Hunt, et al.* v. *Federal Power Commission*, No. 273, This Term, the Power Commission correctly states as to Section 7 of the Gas Act: "The mandatory requirement of a hearing[27] guards against improvident grants." The Power Commission then points out: "[27] Compare, *e.g.*, Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. (Supp. IV) § 309, which does not make a hearing a necessary prerequisite to the grant of a license." See also FPC Annual Reports to Congress (42nd FPC Ann. Rep. 16 (1962); 41st FPC Ann. Rep. 2 (1961); 40th FPC Ann. Rep. 18 (1960); 39th FPC Ann. Rep. 19-20 (1959); 38th FPC Ann. Rep. 16-17 (1958)), wherein the Commission has sought amendments eliminating "mandatory" hearing requirements in Section 7.

nor prescribe a "reasonable" substitute, unless it proceeds "after hearing" with explicit findings under Sections 4 and 5. The question of eliminating "of-record" hearings here thus involves mandatory requirements both in "licensing" and "rate-making."

Next, a "waiver" rule considered sufficiently "protective" in *Storer* does not exist here because of both legal and practical considerations. First, Order No. 242's *two*-pronged provisions bar consideration of a supply under a "tainted" contract in pipeline certificate proceedings; a pipeline thus cannot run the risk of signing such contracts and having its own expansion project collapse because the Commission will not "count" the producers' reserves in passing on adequacy of "committed" reserves; consequently, once Order No. 242 stands *fully* understood, it is obvious that producers can negotiate nothing upon which to seek "waiver." Second, if in the rare instance, as here at this genesis of Order No. 242, an otherwise acceptable contract runs afoul of obscurities in Order No. 232-A, the pipeline project proceeds on schedule *without* the "offending" producer, and the producer still will have nothing as to which "waiver" can be sought.[35] Third, the Commission cannot lawfully substitute a

[35] Thus the Colorado Interstate Gas Company's Wind River Basin, Wyoming, project, of which the Pan American contract here involved is intended to be a part, has already proceeded to formal hearing before the Commission under Section 7, but *without* Pan American because of rejection of its application. See 28 Fed. Reg. 8008 (1963). The Commission's "waiver" argument also overlooks the *time* factor; producers face drilling obligations, lease expirations, legal obligations to royalty owners, and drainage by sales by adjacent lessees. Prompt processing of applications is thus required, and these business compulsions do not permit awaiting the Commission's leisure in a "waiver" process.

"waiver" process addressed to "discretion" for requisite testing of a contract under Sections 7, 4, and 5 standards; under the Act, once the contract is executed, it must be reviewed thereunder and if it has "offensive" clauses, validity must be tested by the Act's known, specific standards, not under unwritten considerations for "waiver." Fourth, if a contract is written without "offensive" clauses, there is thereafter nothing which the Commission can "waive" in applying Sections 4 or 5 to such a sale, as not even the Commission can "waive" the controlling contract. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Accordingly, "waiver" as a substitute for "hearing" here is condemned by the principles that a right to a "hearing" means a "meaningful" hearing, and that petitions for "rehearing" and the like addressed to "discretion" are "too little" and "too late." *Gonzales* v. *United States*, 348 U.S. 407, 415 (1955).

The Commission thus errs, as did the Ninth Circuit, in considering the test of these rules to be passed with a statement that there is no "significant difference" between provisions of the Communications Act and the Natural Gas Act. That "procedures" outlined in *Storer* may have been used cannot breathe life into "ultra vires" clauses written in advance of hearing and required testing under Section 7, 4, and 5 standards.[36]

[36] The Commission also cites other Communications Act cases in which various rules have been sustained or reversed (Pet. Br., p. 25), and *American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298 (1953). In the latter, truly "interstitial" ICC rules were found (a) within delegated authority and consistent with statutory provisions, and (b) not arbitrary and unreasonable. The ICC had held formal examiner's hearings, with some 80 witnesses,

2. The Commission also has violated requirements of the Administrative Procedure Act (APA). The question is not whether the Commission correctly complied with Section 4(b) of that Act (Pet. Br., p. 14), but is by what authority it was acting upon these subjects under Section 4(b).

Elemental propositions are involved. When the Commission decides substantively that "public convenience and necessity" will be served by one clause or another, it can only be exercising power under Section 7 of the Gas Act, which specifies both standard and a hearing. Under the APA, this is "licensing" (§ 2(e)), "adjudication," and issuance of an "order" (§ 2(d)). Since the Gas Act requires that such "adjudication" be on a record of "an agency hearing," Section 5 of the APA applies when the Commission exercises this function, and this requires "decision" "in conformity" with APA Sections 7 and 8. These two sections obviously require hearings, opportunity to present and rebut evidence, and findings and conclusions upon the record so adduced. The hearing requirement of Section 7 of the Gas Act is mandatory, and the APA therefore requires the Commission to proceed in accordance with Sections 5, 7, and 8 thereof. No absolute discretion is left for removal of the sub-

---

formal report, findings, and oral argument (344 U.S. at 307-308; *Lease and Interchange of Vehicles by Motor Carriers*, 51 M.C.C. 461 (1950)). The rules were sustained upon conclusions that *no* specific statutory provisions governed the subject matter, the practice affected did *not* directly control rates, and that affected persons *were* left with available remedies for rate relief. In contrast, here there has been *no* such extensive inquiry below; the subject matter was committed by Congress to specific procedures and standards; and once a contract clause is "fixed," it controls the rights to file rates throughout a long-term contract.

jects of "conditions" upon certificates from these applicable procedures, for summary disposition by a "rule" processed on unserved "comments" under Section 4(b) of the APA. See *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950).

In the same way, when the Commission exercises substantive powers under Sections 4 or 5 of the Gas Act to decide that one clause is "unreasonable" and another is "reasonable" (as it claims to have done), Section 4(b) of the APA does not apply. The Commission is thereby formulating a "rule," but of "particular applicability" under Section 2(c) of the APA. Sections 4 and 5 of the Gas Act require that such a "rule" issue only "after hearing" upon "findings," and Section 4(b) of the APA states:

> "Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection."

Sections 7 and 8 of the APA then require hearing procedures, receipt of evidence, explicit findings, and of-record decisions which the Commission admittedly has not had before issuing "rules" proscribing and prescribing clauses. Section 4(b) of the APA simply was not intended to apply to proceedings deciding such rate matters under the Natural Gas Act. See H.R. Rep. 1980, 79th Cong., 2nd sess., p. 51, fn. 9 (Sen. Doc. 248, p. 285); see also *Wirtz* v. *Baldor Electric Co.*, F. 2d , (No. 17770, D.C. Cir., Dec. 31, 1963).

The implications of accepting the Commission's reading of the APA include just what "communications" could be permitted when Sections 5, 7, and 8 of

the APA are disregarded.[37] Procedures "useful" in *true* "ruling-making" have been thus described: "The administrator or staff member may talk over possible rules with selected parties, by telephone or in person, singly or in groups, by systematically and formally arranged conferences or interviews or in connection with fortuitous contacts occasioned by other business." 1 Davis, *Administrative Law Treatise* (1958), p. 363. Such activity would hardly be appropriate for determining whether a clause controlling rates satisfies the "public convenience and necessity" and is manifestly inappropriate for determining "reasonableness" of a clause controlling rates. Yet, once the "selection" to consign these matters to "rule-making" under Section 4(b) is made, this activity apparently would be permissible, while proper adherence to procedures the Gas Act and APA specify for the functions and subject matter, eliminates such possibilities.

3. "Rule-making" is also inappropriate to determine required "adjudicative" facts. Wholly apart from the APA, Commission decision that Pan American cannot use "redetermination" clauses is a decision requiring economic fact-finding both as to those clauses and as to prescribed alternatives. Under this statute, such a decision cannot be made by summary procedures "rule-making" permits, but must be considered and disposed of as Sections 7, 4, and 5 specifically require.

The Commission's response is two-fold: (1) no "constitutional right" to a hearing exists and only "legislative facts" are involved *because* it has selected "rule-making" as the vehicle for action; and (2) therefore, "presumptions" involved in "legislation" attach, and

[37] See "Staff Report to the Special Committee on Legislative Oversight of the Committee on Interstate and Foreign Commerce," 86th Cong., 2nd sess., pp. 82-83.

the facts, if any, underlying decisions are not relevant to review. The most pertinent questions, however, are whether the agency had authority to act by advance "rule" without "adjudicative" fact-finding, and whether its particular decisions can be sustained on the basis of its recitals. Below, it was correctly decided that the Act's requirements as to the subject must be followed, and "adjudicative" facts must be found.

Where "specialized problems" are so involved, "adjudication" procedure is not only desirable (*Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947)), but in this instance has been so specified by Congress *because* the issue of "reasonableness" requires fact-finding. The idea that an administrator or agency is free to use "any" of the methods of a "legislature," without opportunity for hearing, was labelled "unsound" long ago. See *Southern Ry. Co.* v. *Virginia*, 290 U.S. 190, 197 (1933); *Londoner* v. *Denver*, 210 U.S. 373, 386 (1908). Whether viewed as a "rate" condition on a certificate or as an order fixing a "reasonable" contract, a Commission order finally prohibiting interstate sales except under specified rate-changing clauses must rest upon adjudication of disputed facts requiring an of-record hearing. *Cf. Morgan* v. *United States*, 298 U.S. 468, 480 (1936); *Jordan* v. *American Eagle Fire Insurance Co.*, 169 F.2d 281, 285 (D.C. Cir. 1948). The "basic principle" that such a hearing on "adjudicative" facts is essential is also fully applicable to "denying" licenses here. See 1 Davis, *Administrative Law Treatise* (1958), p. 493.

Order Nos. 232, 232-A, and 242 are not in accord with these principles, and Order No. 242 is then applied to bar access to Sections 7, 4, and 5, and to a determination of "reasonableness." Pan American is told that it

may not sell gas in interstate commerce because its contract has already been found "unreasonable" by a "rule" issued without finding of any of the economic facts actually necessary to determine "reasonableness" under the Act's standards; Pan American is next told that *because* such a "rule" was issued by "rule-making," regardless of its substantive content, a fact-finding hearing was not required; and Pan American is further told that it cannot question a "presumption" that those facts did exist, were found, and were considered.

The court below has correctly concluded that the existence of Section 16 is no such warrant for repeal of Sections 7, 4, and 5 of the Act.

III.

THE COMMISSION'S METHODS HAVE BARRED "EFFECTIVE" REVIEW OF "PROPRIETY" OF CONTRACT CLAUSES

The Commission's method was aptly termed a "bootstrap operation" (R. 117), but onus for absence of a proper record falls upon the Commission, not the court below.

A. Section 19(b) Requires That Any Order Proscribing Clauses Be Reviewed Upon the Record Reflecting Findings and Application of Statutory Standards.

Section 19(b) of the Act requires a record for judicial review. The Commission's belated, suggested extra-record judicial cure for defects in the agency's own actions is not permitted by that section.[38] Section

[38] Here, the Commission first says the "administrative record" provides a basis for determining "rational foundation" of a rule (Pet. Br., p. 14); then says the courts "may review written views and comments" in the "rule-making record" (p. 28); and finally says a court may take "judicial notice" of such a record, or require the agency to produce it (p. 29). Compare this with the Commission's position below opposing review of these rules upon the "rule-making" record, and with Section 19(b), Appendix p.

19(b) also compels the conclusion that there is no proper record here for effective review of decisions as to "propriety" of a clause, or even for testing "reasonableness" of a "rule" in the sense the Commission uses this term.

1. The Tenth Circuit has but bared an effort to prescribe clauses by means precluding judicial scrutiny. The Commission first discussed "favored nations" clauses in the *Pure Oil Company* proceeding, but its statements there were never subjected to judicial testing (*Pure Oil Co.* v. *Federal Power Commission*, 299 F.2d 370 (7th Cir. 1962)). The Commission next issued Order Nos. 232 and 232-A "proscribing" *all* flexible clauses, but as to all clauses other than "favored nations," the Commission "never had a hearing on the issue of whether such provisions are contrary to the public interest" (R. 15, 16); and thereafter successfully opposed review upon the "record" in the Order No. 232 "proceeding" (Pet. Br., p. 9, fn. 8). The Commission next issued Order No. 242, embodying Order Nos. 232 and 232-A as criteria for rejection, and also successfully opposed direct review of Order No. 242 upon that "rule-making" record (R. 112-114).[39] Thereafter, it rejected applications without hearing (R. 89-90), and the certified record for judicial review of this action does *not* include the "rule-making" records (see R. 1-122).

[39] Pan American here seeks review of the question of direct review of Order No. 242 upon the record in the "rule-making" proceeding (*Pan American Petroleum Corporation* v. *Federal Power Commission*, No. 387, This Term, petition for writ of certiorari pending). The Commission opposes such review, despite the statements in its briefs in the instant cases. In the face of the Commission's position below and here in No. 387, it thus is inappropriate for the Commission to suggest that the court below should have taken "notice" of the "rule-making" record, even if Section 19(b) permitted such a process.

For review, the Commission thus leaves a court with its rejection letters and Orders Nos. 232, 232-A, and 242 as printed here (R. 12-17, 18-21, 22-25). The claim then is made that rejection results from conscious application of substantive powers under Sections 7, 4, and 5, but a blanket of "presumptions" is spread over the record leading up to rejection. Yet, these are but unsupported statements, unacceptable as bases for effective testing of validity of substance of an order. *Burlington Truck Lines, Inc., et al.* v. *United States, et al.*, 371 U.S. 156, 168-169 (1962). When Sections 7, 4, or 5 are applied, particularly to decide "reasonableness" of a given clause, at some point in the Act's administration there must be substantial evidence, findings, and a record reflecting actual application of controlling standards (*cf. Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626, 632-635 (1945); *City of Detroit* v. *Federal Power Commission*, 230 F.2d 810, 816-819 (D.C. Cir. 1955); *cert. den.*, 352 U.S. 829 (1956); *State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F.2d 690, 723 (8th Cir. 1953), *cert. den.*, 346 U.S. 922 (1954)). Thereafter, at some point, effective judicial review of a claim that existent power has been "appropriately" exercised compels reference to a factual record and findings required as prerequisites to so applying a statute. See *State of Florida* v. *United States*, 282 U.S. 194 (1931); *Eastern-Central Motor Carrier's Association* v. *United States*, 321 U.S. 194 (1944); *City of Yonkers* v. *United States*, 320 U.S. 685, 691-693 (1944).

2. Below, the court accepted Commission arguments to preclude "direct" review of "general" orders upon "rule-making" records (R. 112-114). This conclusion entails recognition that "indirect" review of "rules"

may involve indulgence of "presumptions," as the Commission says. Therefore, what the court has told the Commission is that its regulatory method of combining such claimed "presumptions" and "indirect" review with rejection without hearing, is a method that not only prevents required Commission testing of clauses under Sections 7, 4, and 5, but also precludes availability of a record Section 19(b) requires for reviewing Commission action proscribing clauses. The ultimate question of substance vital to all parties is validity of various clauses, but under Commission methods, a court can never effectively review these basic, substantive issues under this Act.

Section 19(b) absolutely limits review to the "record upon which the order complained of was entered." See Appendix, p. 64, *infra*, and *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960). The record for Section 19(b) review of a rejection letter thus is limited to the "record" upon which the letter was "entered," and that is *all* that is certified under Section 19(b). The Commission says a "general" order then may be tested, but that the courts then must presume "existence of facts," and those attacking the rule have a "burden" to show there is no "reasonable ground" for "exercise of judgment" even though the record is so limited by Section 19(b). Under such a "system" of "regulation" and "review," "rule-making" obviously can operate to bar scrutiny of records alleged to have been developed in "rule-making" proceedings, and there can be *no* effective review of lawfulness of substantive acts determining "reasonableness" of clauses controlling rates. The Commission thus would erase the judicial review provision from the Act, although opportunity for review of Section 4 or

5 actions is one of the steps essential to constitutionally valid processes under this statute (see *Federal Power Commission* v. *Natural Gas Pipeline Co. of America*, 315 U.S. 575 (1942)).

3. Section 19(b) also bars "notice" of contents of records in other proceedings or review of documents outside the record certified under Section 19(b) by the Commission itself as the "record upon which the order complained of" was entered.[40] Quite correctly, the court below did not violate this record requirement and required cessation of methods operating to immunize Section 4 and 5 actions from judicial review upon a record adduced as the Act requires.

B. The Tenth Circuit Properly Did Not Reach "Reasonableness" of the Rules, and the Ninth Circuit Was Without Jurisdiction to Determine Such Questions

The Tenth Circuit's decision as to validity of Order Nos. 232, 232-A, and 242 rests upon conclusions that as final determinations of lawfulness of clauses, these orders conflict with the Act. That court thus was not required to employ "presumptions" the Commission urges. However, in the *Superior* opinion relied upon by the Commission, the Ninth Circuit purported to find the rules "reasonable," but in so doing, acted without jurisdiction.

Section 19(b) and Section 2112 of Title 28 U.S.C. provide that once the record of a Commission proceeding is certified to one of the courts of appeals, that court acquires "exclusive jurisdiction" to review a Commission order. In Case No. 7002 below (R. 112), the record of the Order No. 242 "rule-making" pro-

[40] *Cf.* Section 19(b) of the Act, Appendix, p. 64; Petitioner's Brief, p. 7, fn. 6, and *Lawn* v. *United States*, 355 U.S. 339 (1958).

ceeding was certified to the Tenth Circuit; was so certified there throughout proceedings before the Ninth Circuit in *Superior*; and so remains under stay of mandate pending decision here in No. 387, This Term. Consequently, Ninth Circuit jurisdiction extended only to determination of validity of the rejection letter before it, and not to review of any questions as to Order No. 242 requiring reference to the Order No. 242 record. Thoughout this litigation and today, because of prior certification, only the Tenth Circuit had and has jurisdiction to so review Order No. 242 as to "reasonableness" upon the "rule-making" record.[41]

This issue is now pertinent here because (1) the Commission seems to attack the Tenth Circuit's conclusions as to "effective" review after that court granted the Commission's own motion to dismiss petitions seeking direct review upon the "rule-making" record; and (2) the Commission cites the Ninth Circuit's action as correct review under Section 19(b) without a "rule-making" record. However, even in review of a "rule," a record is required under Section 19(b) if "reasonableness" of a "rule" is to be determined.[42] The Tenth Circuit thus correctly concluded

[41] Because of Commission positions on reviewability, this question of jurisdiction was *not* raised in the Ninth Circuit and was *not* decided there. In the event the petition in the *Superior* case, No. 684, This Term, is granted, this question may be more fully considered.

[42] Thus, in *United States* v. *Storer Broadcasting Company*, 351 U.S. 192 (1956), a "rule" was considered upon direct review on the "rule-making" record, and in *American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298 (1953), when the question of "arbitrariness" and "unreasonableness" was reached, the Court cited the "evidence marshalled before the Commission" (344 U.S. at 314).

that if, as the Commission says, the "general" rule-making order is *not* directly reviewable under Section 19(b), claims of "justification" requiring review of a record cannot be accepted under Section 19(b). However, the Ninth Circuit erred not only in concluding that a record is unnecessary to testing such claims, but also in proceeding without Section 19(b) jurisdiction to the question of "reasonableness" when the "rule-making" record involved had been and was still certified to the Tenth Circuit.

C. The Tenth Circuit Correctly Requires Proceedings on a Record

The Tenth Circuit's conclusion is that the subject matter and Commission functions being performed require proceedings under Sections 7, 4, and 5. This is *not* a decision that a "trial-like" hearing is required in "rule-making"; the decision is that summary "rule-making" cannot suffice when the Commission acts on these particular subjects because of statutory requirements.

Under the holding, the Commission may consider Pan American's contract in a proper forum permitting testing of the "redetermination" clause and relevant economic facts. The Tenth Circuit has not directed "case-by-case" testing of this or any other clause, but leaves the Commission free to proceed in consolidated Section 7 cases, or in "area-rate" cases under Sections 4 and 5.[43] Therein, "favored nations," "spiral," or other clauses ultimately may be measured against the Act's standards, and "just and reasonable" alternatives may be substituted. There, orderly, in-

[43] See fns. 24, 25, 26, p. 36, *supra*.

formed Commission review of existing clauses, *and* of any substitutes, upon understandable records is not only possible, but is the only process which can result in clauses consistent with all of the Act's purposes and the "reasonableness" standard.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals in Case No. 7303 below should be affirmed.

Respectfully submitted,

W. W. HEARD
J. P. HAMMOND
WM. H. EMERSON
P. O. Box 591
Tulsa, Oklahoma 74102

WILLIAM J. GROVE
CARROLL L. GILLIAM
600 Mubsey Building
Washington, D. C. 20004

Attorneys for Respondent Pan American Petroleum Corporation

March, 1964

APPENDIX

1. The Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. § 717, *et seq.*, provides, in pertinent part as follows:

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or regulate such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regula-

tions, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and refer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Com-

mission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962) 15 U.S.C. § 717c]

Sec. 5 (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected, by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discrim-

inatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * *

Sec. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in acordance with the procedure provided in subsection (e) of this section and such certificates shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service

or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

* * *

Sec. 16. The Commission shall have power to perform any and all acts and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find

necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717o]

* * *

Sec. 19. (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the

filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section [1254] of Title 28. [52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r(b)]

2. The Administrative Procedure Act, 60 Stat. 237 (1946), as amended, 5 U.S.C. § 1001, *et seq.*, provides, in pertinent part as follows:

Sec. 2. As used in this Act—

(c) Rule and rule making.—"Rule" means the whole or any part of any agency statement of general or particu-

lar applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) Order and adjudication.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) License and licensing.—"License" includes the whole or any part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

• • •

(g) Agency proceeding and action.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. [60 Stat. 237 (1946); 5 U.S.C. § 1001]

• • •

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Effective dates.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule. [60 Stat. 238 (1946); 5 U.S.C. § 1003]

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

NOTICE OF HEARING AND ISSUES

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

PROCEDURE

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the par-

ties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

AUTHORITY AND FUNCTIONS OF OFFICERS AND EMPLOYEES

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

DECLARATORY ORDERS

(d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty. [60 Stat. 239 (1946); 5 U.S.C. § 1004]

* * *

Sec. 7. In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 1007 of this title shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 1007 of this title, and (9) take any other action authorized by agency rule consistent with this chapter.

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence

and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary. [60 Stat. 241 (1946); 5 U.S.C. § 1006]

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) Action by subordinates.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such

decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Submittals and decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. [60 Stat. 242 (1946); 5 U.S.C. § 1007]